MBf FINANCE BHD.

v.

EUSHUN PROPERTIES SDN. BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[CIVIL SUIT NO. D1-23-2773-87]
1 AUGUST 1991

CONTRACT: *Loan agreement - Disbursement of the loan subject to preconditions - Whether borrower or lender was in default.*

EVIDENCE: *Whether evidence can be adduced to contradict or vary the terms of a formal agreement - Evidence Act s. 92.*

CIVIL PROCEDURE: *Summary judgment - No triable issue - High Court Rules, O. 14.*

The plaintiffs had lent money to the first defendant; the other defendants were guarantors. According to the loan agreement, part of the loan (RM4.5m) was for the purpose of restructuring the borrowers' group borrowings and the remainder (RM1.5 m) for purposes of working capital. It was provided in Clause 5.01 of the agreement that if the borrower wanted to use the loan for some other purpose, the borrower must obtain the prior written consent of the lender (plaintiffs). The agreement also provides that the disbursement of the RM4.5 m was subject to several preconditions being fulfilled by the borrower and that if the borrower shall be in default, the lender shall be at liberty to terminate the loan or suspend the disbursement.

The plaintiffs contended that the borrower had defaulted in respect of payment of interest on due dates and recalled the loan. Recovery action was instituted and the borrower having failed to repay the loan, the plaintiffs brought action against the guarantors. For the defendants, it was argued that the plaintiffs' then Chief General Manager had agreed that the balance of the loan could be utilised to pay off overdue interest due on the initial drawdown of the RM4.5 m and that since the plaintiffs had refused to allow the 5th drawdown on the said balance, the plaintiffs had breached the agreement and was therefore not entitled to rely on the non-payment of the interest to recover the loan. In a sworn affidavit, the then General Manager denied ever having agreed in such terms.

The plaintiffs applied to the SAR to grant them an O. 14 judgment but the application was refused; hence this appeal.

Held:

[1] Whilst there is nothing wrong with utilising working capital to pay interest that may be due, unless there is admissible evidence of a clear agreement to that effect, the defendants' contention is unacceptable.

[2] Letters produced by the defendants do not show that the money can be used to pay off interest. In any event, s. 92 of the Evidence Act prevents the defendants from adducing evidence to contradict or vary the terms of the formal agreement between the parties. The section also precludes the guarantors from relying on their contention that the said General Manager would look to other securities before enforcing the guarantee.

[3] At the time of the loan, the agreed interest rate was 15%. In the event of the borrowers' default, it was also agreed that a further 2% p.a. be paid as agreed damages. In their writ,

the plaintiffs claimed interest on overdue amounts at 16%. Since this rate is less than the agreed prescribed rate, despite the defendants' contention with regard to this lesser rate, the defendants had failed to raise any bona fide triable issue.

[4] Consequently, since there is no triable issue in respect of the claim, there will be final judgment against the defendants.

[Plaintiff's application allowed with cost.]

Legislation referred to:
Evidence Act 1950, s. 92
Rules of the High Court 1980, O. 14

For the plaintiff - Ranjit Singh; M/s. Cheang & Ariff
For the defendant - Teh Meng Teck; M/s. Meriam Cheah Teh & Su

JUDGMENT

VC George J:

This is an appeal by the plaintiffs against the refusal by the SAR to grant them an O. 14 judgment.

RM6 million was agreed to be lent by the plaintiffs to the 1st defendant on guarantees by the other defendants. There was a formal loan agreement which provided that of the RM6 million agreed to be lent, RM4.5 million was for the purpose of restructuring the borrowers' group borrowings and the balance of RM1.5 million for the purpose of working capital. Clause 5.01 of the agreement provides that if the borrower required the proceeds of the loan for any other purpose the borrower shall obtain the prior written consent of the lender. Clause 6.01 provides for the RM4.5 million to be disbursed upon the conditions set out in Clause 6.01 being fulfilled by the borrower. One of the conditions was that if there were amounts the payment of which had been overdue on existing accounts of any of the companies in the borrowers' group of companies with the plaintiffs such payments be first settled in full. The RM4.5 million was disbursed.

Clause 6.02 provides that the said balance of RM1.5 million may be disbursed progressively for the borrowers' working capital "upon prior fulfilment of the conditions set out in clause 6.01". It goes on to provide:

> Pending the fulfilment in manner satisfactory to the lender of the conditions herein stipulated, the lender may at its absolute discretion terminate the loan or suspend the disbursement of the loan or any part thereof.

The borrower was to pay interest at 2.5% p.a. above the lender's base lending rate (which at date of agreement was 12.5% p.a.) calculated on a daily rest basis and payable quarterly. In respect of late payments an additional 2% interest was payable.

There appears to have been agreement arrived at in respect of the progressive disbursement of the RM1.5 million at fixed agreed amounts on a quarterly basis. When the date for the 5th of the agreed progressive disbursement arrived the plaintiffs refused to allow the drawdown. The plaintiffs say that this was because the borrower had defaulted in respect of payment of interest on due dates.

The loan was recalled and a letter of demand was sent to each of the guarantors. No payment was made and hence this action.

For the defendants it was contended that in granting the loan facility the plaintiffs' then Chief General Manager Kung Beng Hong had agreed that the balance of the RM1.5 million after the initial drawdown of RM4.5 million was to be utilised by the 1st defendant to pay off the interest on the said initial drawdown of RM4.5 million which was payable on a quarterly basis. The defendants say that the plaintiffs refusing to allow the 5th drawdown on the RM1.5 million prevented the 1st defendant from paying off the interest due and that such refusal amounted to a breach of the agreement that had been arrived at between the parties and it was contended that in the circumstances the plaintiffs were not entitled to rely on the non-payment of the interest then due to call for repayment of the loan as they have done.

For the defendants it was also pointed out by Counsel that the amount of quarterly drawdown on the RM1.5 million was more or less the interest that would accrue at the end of each of the quarters which it was submitted demonstrates that the understanding was as contended by the defendants.

Against this Kung Beng Hong (who is no more with the plaintiffs) has sworn an affidavit denying that he had been party to any such agreement.

Now, as has been seen, Clause 5.01(ii) of the loan agreement sets out that the RM1.5 million was for the purpose of working capital and the clause goes on to provide that if the money was to be utilised for any other purpose the prior written consent of the lender is required.

In my judgment while it could very well be that there is nothing wrong with utilising working capital to pay interest that may be due, unless there is admissible evidence of a clear agreement to the effect that the drawdowns were to be utilised to pay off interest the defendants' contention in this respect is unacceptable.

The two letters that the defendants rely on do not state that the money is to be used to pay off interest. In any event the plaintiffs have rightly called to aid s. 92 of the Evidence Act to contend that the defendants are precluded from adducing evidence to contradict or vary the terms of the formal agreement between the parties.

In any event for the plaintiffs it was contended that one other reason for the suspending of disbursements was that there were amounts overdue on another existing account between the parties. Clause 6.01 sets out conditions precedent for disbursements to be made and Clause 6.01(g) provides for full settlement of "overdues on existing accounts". It is not denied that there was such "overdues" but it was contended that Clause 6.01 was not relevant in respect of Clause 6.02. In my judgment there is no merit in that submission in the face of Clause 6.02 providing as it does for the prior fulfillment of "the condition precedent referred to in ss. 6.01 and 6.02 hereof."

The argument that the plaintiffs had not pleaded "overdues" on existing accounts does not take the defendants anywhere because that was only relied on by the plaintiffs to withhold disbursements. The suit is based on failure to pay up on demand.

The same s. 92 precludes the guarantors from relying on their contention that Mr. Kung had also agreed (denied by Kung) that the plaintiffs would look to other securities before calling upon the guarantors on their guarantee.

The defendants contend that the amount sought by the plaintiffs in any event is in excess of what they are entitled to in that interest had been calculated at a higher rate than they were entitled to. For the contention reliance was placed on a report in the *Star* newspaper of 25 August 1987 to the effect that Bank Negara had announced that commercial banks would

be reducing their base lending rate to 7.5% from 1 September 1987. Counsel for the plaintiffs pointed out that any effect to be given to that report is not relevant because the plaintiff is not a commercial bank. The defendants also referred to a *Straits Times* report of 3 October 1987 which does not help. All it states is that finance companies other than Dvpt. & Commercial Finance and Malayan United Finance had ignored Bank Negara's "recommendation" to reduce the BLR.

Reference was made to an Association of Finance Companies circular of 30 September 1987. This is not relevant since the writ in the instant case was issued earlier on 13 August 1987. I agree with the contention by Counsel for the plaintiffs that once the contractual relationship came to an end as it had here, if not earlier, at least on the causing of the writ to issue, the claim became crystallised and there is no call for the plaintiffs to keep amending the rate of interest thereafter.

At the time the loan agreement was entered into, it was agreed between the parties that the base lending rate of the plaintiffs was 12.5%. The borrower was to pay interest at 2.5% above that rate. The plaintiff was entitled to vary the rate of interest by giving written notice of such variation. Where the borrower was in breach of the agreement in respect of repayments it had agreed to pay the lender agreed damages in respect thereof by payment of the additional 2% p.a. on top of the prescribed rate of 2.5% above base lending rate which at the rates prevailing on the date of the loan would be 12.5 + 2.5 + 2 = 17% p.a.

In the writ the plaintiffs claim interest on overdue amounts at 16% p.a. For the defendants it is contended that how this rate was arrived at is not shown. It seems to me that that is a frivolous contention. 16% is less than 17%. If it should be even lesser than that it is for the defendants to show some basis for such a contention so as to make it a *bona fide* triable issue. This they have not done.

As far as the guarantors are concerned on top of it all there is a conclusive evidence clause.

I have failed to see any *bona fide* triable issue in respect of this claim and accordingly the plaintiffs' appeal is allowed with costs. There will be final judgment against the defendants and each of them as prayed in encl. (9).

And also found at [1992] 1 CLJ 447